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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 MARGARET CRUICKSHANK,

12 Plaintiff,

13 v.
14

15 WELLS FARGO BANK, N.A., et al.,

16 Defendants.
17

CASE NO. 10-CV-1545 W (NLS)

**ORDER GRANTING IN PART
& DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS [DOC. 27]**

18
19 Pending before the Court is Defendant Wachovia Mortgage, FSB's motion to
20 dismiss Plaintiff Margaret Cruickshank's Second Amended Complaint ("SAC"). The
21 Court decides the matter on the papers submitted and without oral argument pursuant
22 to Civil Local Rule 7.1(d.1). For the reasons outlined below, the Court **GRANTS IN**
23 **PART** and **DENIES IN PART** Wachovia's motion [Doc. 27].
24

25 **I. BACKGROUND**

26 Plaintiff Margaret Cruickshank, an elderly widow, is the owner of a condominium
27 located at 14740 Plaza Animado #161, San Diego, California (the "Property"). (SAC
28 [Doc. 23], ¶1.) She purchased the Property in 1999 for \$138,000. (*Id.*, ¶14.)

1 On or about February 15, 2005, Mrs. Cruickshank entered into a Pay Option
2 ARM loan with World Savings. (SAC, ¶ 16.) The principal amount of the loan was
3 \$250,000. (*Id.*)

4 In 2006, Phillip Franklin, a loan officer and/or agent from World Savings, F.S.B.,
5 contacted Mrs. Cruickshank about refinancing the Property. (SAC, ¶20.) At the time,
6 Mrs. Cruickshank was 81 years of age, and legally deaf and disabled. (*Id.*, ¶ 15.) She
7 was also unemployed, and received approximately \$1,660 in Social Security payments
8 and a surviving-spouse pension benefit through Ford Motor Company. (*Id.*, ¶18.)

9 According to the SAC, Mrs. Cruickshank notified Franklin that her annual
10 income was insufficient to cover her escalating living and medical expenses, and
11 therefore she inquired about a reverse mortgage. (FAC, ¶21.) Franklin “falsely
12 represent[ed] that she did not qualify for a reverse mortgage. . . .” (*Id.*, ¶22.) Instead,
13 he told her that a “refinance loan was better than a reverse mortgage, with a low fixed
14 rate, including a built-in feature that allowed her to make a low minimum payment for
15 her convenience which would help her financial situation” (*Id.*, ¶ 24.) Relying on
16 this representation, Mrs. Cruickshank agreed to apply for the recommended Pay Option
17 ARM loan, with a principal balance of \$310,000. (*Id.*) Before the loan closed, however,
18 Franklin convinced Mrs. Cruickshank to a different loan: a \$45,000 home equity line
19 of credit (“HELOC”) and refinance of the first loan in the amount of \$245,000. (*Id.*,
20 ¶25.)

21 Mrs. Cruickshank alleges that she informed Franklin that her monthly fixed
22 income was \$1,660. (SAC, ¶30.) However, this information was disregarded and
23 instead Franklin misstated her monthly income as \$6,000 on the loan application in
24 order to ensure that Mrs. Cruickshank would qualify for the HELOC. (*Id.*, ¶30.) Mrs.
25 Cruickshank alleges that she was unaware that the application overstated her income.
26 (*Id.*) Based upon the falsified documents, on or about March 17, 2006, Mrs.
27 Cruickshank was placed into an adjustable-rate mortgage and the HELOC. (*Id.*, ¶31.)
28

1 In April 2006, Mrs. Cruickshank's minimum monthly mortgage payment was
 2 \$1,204, in addition to a monthly finance charge on the HELOC in the amount of \$325.
 3 (SAC, ¶134.) Because her monthly income exceeded these payments by only \$71, Mrs.
 4 Cruickshank was required to draw greater amounts from the HELOC to cover her living
 5 and medical costs. (*Id.*) By May 2007, the HELOC funds ran out, and Mrs.
 6 Cruickshank was forced to use her credit cards to make monthly payments. (*Id.*) In
 7 September 2008, Mrs. Cruickshank was hospitalized as a result of the stress caused by
 8 the loans. (*Id.*, ¶137.)

9 On February 4, 2010, Defendant Wells Fargo Bank recorded a Notice of Default
 10 and Election to Sell under Deed of Trust, and a Trustee's Sale was scheduled for May
 11 4, 2010. (SAC, ¶139.) On May 3, 2010, Mrs. Cruickshank filed for Chapter 13
 12 Bankruptcy relief. (*Id.*)

13 On June 15, 2010, Mrs. Cruickshank filed suit against the defendants in the San
 14 Diego Superior Court. (*See Removal Notice* [Doc. 1], Ex. A.) On July 23, 2010,
 15 Defendant Wachovia removed the case to this Court based on diversity jurisdiction.
 16 (*Id.*)

17 On August 26, 2010, Mrs. Cruickshank filed an FAC, asserting 14 state-based
 18 causes of action. Wachovia filed a motion to dismiss based on a number of grounds. On
 19 February 27, 2011, this Court issued an order finding, among other things, that the
 20 causes of action were time barred. The order granted Mrs. Cruickshank leave to amend
 21 certain causes of action.

22 On March 4, 2011, Mrs. Cruickshank filed the SAC. Defendant again seeks to
 23 dismiss the SAC based on the statute of limitations.

24 25 **II. DISCUSSION**

26 **A. The allegations in the SAC establish that the statute of limitations** 27 **accrued in May 2007.**

28 Under California law, the statute of limitations accrues "upon the occurrence of
 the last element essential to the cause of action." California Sansome Co. v. U.S.

1 Gypsum, 55 F.3d 1402, 1406 (9th Cir. 1995) (citing City of San Diego v U.S. Gypsum,
2 30 Cal. App.4th 575, 582 (1994)). “A tort claim does not accrue until there is
3 wrongdoing *and* ‘actual and appreciable harm.’” Id. (emphasis in original). The
4 defendant, therefore, “has the burden of demonstrating the complained of wrongdoing
5 *and* harm occurred outside the limitations period.” Id.

6 Here, taking the allegations in the SAC as true, Mrs. Cruickshank knew or should
7 have known about the alleged wrongdoing in February 2006 when the loan transaction
8 closed. At that time, she received a copy of the loan application that misstated her
9 income as \$6,000. Based on this misstatement, a reasonable person should have been
10 alerted to Franklin’s wrongful conduct. See Jolly v. Eli Lilly & Co., 44 Cal.3d 1103,
11 1111 (1988) (“the limitations period begins once the plaintiff ‘has notice or information
12 of circumstances to put a reasonable person on *inquiry*’ [Citations omitted.] A
13 plaintiff need not be aware of the specific ‘facts’ necessary to establish the claims. . . .”)

14 Mrs. Cruickshank argues that defendants concealed the falsified application “by
15 intentionally embedding the unsigned Loan Application in the bundle of documents she
16 received from Defendants’ agents at closing in order to prevent her from becoming
17 aware of Defendants’ misconduct.” (*Opp.* [Doc. 28], 9:4–8; SAC, ¶ 30.) This argument
18 is unpersuasive because Mrs. Cruickshank admits that she had the falsified application,
19 but simply failed to review the documents.

20 The next issue is when Mrs. Cruickshank suffered appreciable harm. Mrs.
21 Cruickshank argues that she did not suffer appreciable harm “until her loan
22 payments exceeded her ability to pay,” which she contends occurred in September 2008.
23 (*Opp.*, 7:9–15.) But the allegations in the SAC establish that this occurred in May of
24 2007:

25 In May of 2007, the HELOC funds ran out, and Plaintiff was forced to
26 make her monthly mortgage payments by using the maximum amount
27 available on her credit card for the next year.
28 (SAC, ¶34.)

1 Defendant argues that Mrs. Cruickshank suffered appreciable harm as early as
2 April 2006 when Mrs. Cruickshank alleges she was paying \$1,529 in mortgage payments
3 and was, therefore, left with only \$71 to cover other living expenses. The Court
4 disagrees with this argument for two reasons.

5 First, the SAC does not identify the amount Mrs. Cruickshank was paying
6 towards her mortgage before the 2005 loan, which may have been even higher. In other
7 words, to the extent Mrs. Cruickshank's financial situation improved or remained
8 roughly the same after the 2005 loan, the Court cannot find that she suffered
9 appreciable harm.

10 Second, Defendant's argument fails to take into account Mrs. Cruickshank's
11 HELOC. The HELOC necessarily increased the amount of money available to her to
12 pay living expenses. This fact also suggests that Mrs. Cruickshank did not suffer
13 appreciable harm in April 2006.

14 For the forgoing reasons, under the standard applicable to a motion to dismiss,
15 the Court finds that the SAC establishes that Mrs. Cruickshank's causes of action
16 accrued in May 2007. Accordingly, the causes of action for breach of fiduciary duty,
17 fraud, negligence, negligent misrepresentation, and intentional infliction of emotion
18 distress are time barred. The causes of action for financial elder abuse, and violation of
19 California Business and Professions Code § 17200 are not time barred.

20
21 **B. Mrs. Cruickshank's Elder Abuse Claim is sufficiently pled.**

22 Defendant also argues that Mrs. Cruickshank's financial elder abuse claim is
23 insufficiently pled because she does not allege that Wachovia ratified Franklin's
24 conduct. The Court disagrees.

25 The SAC alleges that Wachovia is the successor to World Savings, which
26 intentionally targeted elderly borrowers, such as Mrs. Cruickshank, to place them in
27 loans with "toxic terms" in order to generate substantial profits. (SAC, ¶¶ 3, 12.) The
28 SAC further alleges that World Savings "trained, directed, and authorized its"

1 employees, agents, mortgage brokers and loan officers to implement” the type of scheme
2 used on Mrs. Cruickshank. (*Id.*, ¶ 13.) Finally, the SAC specifically alleges that “each
3 and every Defendant alleged herein ratified the conduct of each and every other
4 Defendant.” (*Id.*, ¶ 9.) Based on these allegations, the Court finds Mrs. Cruickshank
5 has sufficiently pled a claim for financial elder abuse.

6
7 **C. Injunctive relief and restitution are not causes of action.**

8 Defendant argues that Mrs. Cruickshank’s causes of action for injunctive relief
9 and restitution should be dismissed because they are not recognized causes of action
10 under California law.

11 Although Mrs. Cruickshank argues that she is entitled to restitution and
12 injunctive relief, she does not cite any authority supporting restitution and injunctive
13 relief as independent causes of action. Accordingly, the Court will grant Defendant’s
14 motion to dismiss the eighth and ninth causes of action.¹

15
16 **D. The declaratory relief cause of action.**

17 Defendant argues that because all of Mrs. Cruickshank’s substantive claims fail,
18 so too does the declaratory relief cause of action. However, as set forth above, Mrs.
19 Cruickshank’s causes of action for financial elder abuse and violation of the Business &
20 Professions Code are not time barred. Additionally, the cause of action for financial
21 elder abuse is sufficiently pled. Accordingly, Defendant’s request to dismiss the
22 declaratory relief claim is denied.

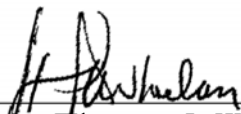
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27 ¹Although the Court grants the motion to dismiss the causes of action for restitution
28 and injunctive relief, the SAC also lists restitution and injunctive relief as remedies. Defendant
did not file a motion to strike those remedies.

1 **III. CONCLUSION AND ORDER**

2 In light of the foregoing, the Court **GRANTS** Defendant's motion to dismiss the
3 following causes of action: breach of fiduciary duty (1st); fraud (2nd); negligence (3rd);
4 negligent misrepresentation (4th); intentional infliction of emotional distress (7th);
5 restitution (8th); and injunctive relief (9th). The motion is **DENIED** as to the remaining
6 causes of action.

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8 **IT IS SO ORDERED.**

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10 DATED: May 24, 2011

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14 Hon. Thomas J. Whelan
15 United States District Judge
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